

P Rob^t Gardiner

JULY 24, 1766.

25th Feb 1766

*See right hand
order of Hospital
before broken, to
conclude or doing
petition*

Unto the Right Honourable the Lords of Council and Session,

THE

P E T I T I O N

O F

ROBERT GARDINER late Commissary
to the Army in *Scotland*,

Humbly sheweth,

THAT George Pitcairne Merchant in *Edinburgh*, Jan. 6, 1762, was, of this Date, appointed Treasurer to the Trinity Hospital by the Magistrates and Town-council of *Edinburgh*, who, *virtute officii*, are the Governors and Administrators of said Hospital. And here it is material to observe, that as the Appointment for the Treasurer to this Hospital does noways resemble the annual Election of the Treasurer, or other Office-bearers within the Royal Burghs, which intitles them to continue in Office from Year to Year, this Office of Treasurer to the Trinity Hospital is merely precarious, *durante beneplacito*, a Circumstance which, in the Sequel, the Petitioner will have occasion to lay Stress upon.

It was not usual, at that Time, to require any Caution from the Treasurers of those Hospitals whereof the Magistrates and Town-council were the Administrators; and it appears, that the Magistrates and Town-council had been ex-

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tremely remiss in stating and clearing Accounts, from time to time, with the Treasurers of these Hospitals, so that, for any thing that could appear, they might be in arrear for the whole of their Intromissions, excepting what Part thereof they had applied for the interim Support of the Hospitals.

The Treasurer of *Heriot's Hospital*, who, in this respect, was *in pari casu* with the Treasurer of the *Trinity Hospital*, having unexpectedly failed in his Circumstances, greatly in arrear to the Hospital, which gave occasion to great Clamour and Complaint against the Magistrates for so culpable a Failing in Duty, both of the Neglect to exact Caution, and in not calling their Treasurer regularly to account, a Resolution was taken, that, in Time coming, the Persons intrusted with Offices of this Kind should find Caution for their due and faithful Administration.

There is not the least Appearance that this Resolution, which only respected future Appointments, was meant to comprehend Mr. *Pitcairne*, who was already in Office as Treasurer to the *Trinity Hospital*, and whose Credit was not, at that Time, liable to any Suspicion. However, Mr. *Pitcairne*, conscious, as may be supposed, of his own Insolvency, which soon thereafter broke out, and of his being greatly in arrear from his Intromissions with the Hospital's Funds, did, in order to avoid any Examination into the State of his Accounts, whereby these Arrears might have been discovered, make a voluntary Offer to the Magistrates to find Caution to the Extent of 400 *l.* and as the Magistrates could with no Reason reject such an Offer, Mr. *Pitcairne* applied to the Petitioner to bind as Cautioner for him, in his future Management of the Hospital-funds; and as the Petitioner had then no Suspicion of his being thereby subjected to by-gone Arrears, as he had no Knowledge, that such Arrears were due, or that it was meant to make him liable for the same, and had no Reason to doubt that Mr. *Pitcairne's* by-gone Accounts had been regularly settled and cleared, he readily

readily consented to become Surety for Mr. *Pitcairne* to the Extent of 400 *l.* which Mr. *Pitcairne* having notified to the Magistrates, they gave Orders to *John Forbes*, one of the Servants of the Town-council, to make out the Bond of Cautionry; which was accordingly done and executed, both by *Pitcairne* and the Petitioner, of the Tenor to be hereafter mentioned.

As the Petitioner had no Communings upon this Subject with the Magistrates and Town-council, he has no Knowledge what passed between *Pitcairne* and them upon that Occasion, though, according to the Information he has received, it was never once mentioned or proposed that Mr. *Pitcairne* should find Caution for Bygones; and *res ipsa loquitur*, that this could not possibly be intended, as it now appears that Mr. *Pitcairne*, at that Time, was in arrear considerably more than the 400 *l.* and might have been in arrear double or triple that Sum; so that if it had been intended that Security should be found for bygone Arrears, they would undoubtedly have stated Accounts with *Pitcairne*, in order to discover what his bygone Arrears were, and would have obliged him, either instantly to pay up that Arrear, or to find Caution for the same, whatever the Extent of it was, besides the 400 *l.* to answer future Intromissions.

This Fact is capable of Proof; but the Petitioner does expect it will not be denied on the Part of the Magistrates, and as it stands confessed, that from the Date of *Pitcairne's* Appointment, till this Day, they have never stated Accounts with him, and consequently could have no Knowledge whether any or what Arrears were due by him; the Petitioner calls upon them explicitly to confess or deny, whether there was, upon this Occasion, any the least mention of Arrears, as supposed to be due by *Pitcairne*, or that Caution should be found for these; and if it shall be confessed, which the Petitioner expects it will, that no such thing was ever mentioned, either when the aforesaid Resolution was taken by the

the Magistrates, or when *Pitcairne* voluntarily offered to find Caution, the Petitioner will be pardoned to think, it will be an extreme hard Case, that *Pitcairne's* intervening Insolvency shall subject him, the Cautioner, in the Payment of these Arrears.

For your Lordships will be informed, as now appears from *Pitcairne's* Accounts, that he was at that Time Debitor to the Hospital, in a Sum considerably above the 400 *l.* and when he gave way in the Beginning of April 1764, scarce five Weeks after the Petitioner had granted the Bond of Cautionry, he remained Debitor to the Hospital in 447 *l.* Sterling, though he had paid away considerable Sums for the Hospital's Use.

And your Lordships will further be informed, that from Mr. *Pitcairne's* Cash-book it appears, that from the Time he first made the Offer to find Caution, his whole Intrusions with the Hospital-revenue amounted to no more than 39 *l.* Sterling, of which Sum, 9 *l.* Sterling, only, was received after the Petitioner had granted the Bond of Cautionry. To all which the Petitioner has only further to add, in Point of Fact, that, as Mr. *Pitcairne* gave way upon the 3d of April 1764, i. e. about four Weeks after the Petitioner had granted his Bond of Cautionry, the Magistrates turned him out of Office, and appointed another in his Place.

Upon Discovery that *Pitcairne* was owing so great an Arrear, the Magistrates were pleased to make a Demand upon the Petitioner for 400 *l.* and, upon the Petitioner's remonstrating against the Injustice of this Claim, he was threatened with Diligence, which obliged him to apply for Suspension, which was passed, and the Suspension coming to be discussed before Lord *Strichen*, his Lordship was pleased to find the Letters orderly proceeded, and upon advising a Reclaiming Petition and Answers, your Lordships were pleased to adhere, by Interlocutor 16th July 1766.

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The Petitioner takes the liberty, which the Forms of Court allow, of submitting this Question to your Lordships Review; and, conscious to himself, that he had not the most distant Intention of becoming bound for Bygones, he must think it will be an extreme hard Case, if the Bond of Cautionry, formed by one of the Servants of the Town-council, shall receive such a Construction, as to subject him to so large a Sum, when Mr. *Pitcairne* continued his Office but a few Weeks after his Cautionry, and in that Time had intromission with no more but 9 *l. Sterling*.

Cautionary Obligations have always been in use to receive the most strict Interpretation, and never to be extended, by Construction, beyond the precise Letter of the Security. It is a *literarum obligatio* in the strictest Sense; and this ought the rather to obtain in the present Case, when it is considered, that the Bond of Cautionry was formed by a Servant of the Town-council, and, consequently, that every dark or doubtful Expression therein ought to be construed against them, and, instead of extending, to restrain, the Words of the cautionary Obligation, as far as possible.

When the Tenor of the Bond of Caution is attended to, it appears inaccurate in the highest Degree; for, as it stands, confessed, that the utmost Length it was ever intended the Petitioner should be bound, was to the Extent of 400 *l.* The Bond, if rightly conceived, ought to have bound *George Pitcairne*, and him only, to make just Count, Reckoning and Payment, of the Rents and Revenue of said Hospital, so far as intromitted with by him, and to pay over the same to the particular Uses and Purposes as should be directed, and that without any Limitation, as to the Sum for which *George Pitcairne* was to be so bound, which behoved to depend upon the Extent of his Intromissions; and the Petitioner, as Cautioner, should have been taken bound for *George Pitcairne's* Performance of the Premises, to the Extent of 400 *l.*

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Instead of which, as the Bond is conceived, *George Pitcairne* and the Petitioner are taken, conjunctly and severally, bound for Performance of all and singular the Premises, to which is subjoined the Clause, that was meant to limit the Petitioner's Obligation to the 400*l.* but which, as conceived, limits the Obligation upon *George Pitcairne*, as well as upon the Petitioner, to make good all Deficiencies to the Extent of the said Sum of 400*l.*

So that, according to the literal Construction of this last mentioned Clause, compared with the Recital in the Preamble of the Bond, bearing, that *George Pitcairne* had proposed to give Bond to the Extent of 400*l.* by himself, and the Petitioner as Caution for him, it would seem, that neither *Pitcairne* nor the Petitioner, was to be bound beyond the 400*l.* though *Pitcairne's* Intrusions had been triple that Sum; in flat Contradiction to which, according to the Construction endeavoured to be put upon the last Clause, *Pitcairne* and the Petitioner are bound to make good all Deficiencies to the Extent of the 400*l.*

And, if the Clause with regard to making up Deficiencies, shall be regarded, not as referring to the former Clauses, but as constituting, of itself, a distinct Obligation, and respecting a Period entirely different, viz. the Intrusions prior to the Date of the Bond, a very extraordinary Consequence must follow, that the Petitioner's Obligation is much broader than the Magistrates offer to maintain. Upon this last Clause he would be obliged to make good the Balance at that Time in *Pitcairne's* Hands, to the Extent of 400*l.* and by the former Clause, obliging himself to hold Count and Reckoning to the Hospital, without any Limitation or Restriction whatever, he would besides be liable for all Intrusions posterior to the Bond, to whatever Sum they might happen to amount.—A Proposition, than which nothing can possibly be more opposite to the Intention of Parties,

Parties, acknowledged on all Hands, that the Petitioner should in no Event be liable beyond the 400 *L.*

If the Magistrates can reconcile these Clauses in the Sense they now choose to understand them, the Petitioner must confess it is more than he can do; the true Meaning of Parties plainly was, that *Pitcairne* should be answerable for all his Intromissions, whatever the Extent of them was, and that the Petitioner should only be liable to the Extent of 400 *L.* supposing that *Pitcairne's* future Intromissions should be ten times that Sum; and therefore, the last Clause must be held merely as restricting the former Clause for the Petitioner's Concern, and the Word *Deficiencies*, must necessarily be understood as respecting Deficiencies arising on what shall be intromitted with, (for which alone the Obligation to account is conceived), so as the same did not exceed the 400 *L.*

And that this was the Magistrates own Sense of the Matter, appears from their judicial Admission in this Process, which restricts their Demand against the Petitioner, to the 400 *L.* neat, though *Pitcairne's* Intromissions exceeded that Sum.

The Intention of Parties, that the Petitioner, in no Event, should be liable beyond the restricted Sum, standing thus confessed, the Restriction affords the most satisfying Evidence of the past Intromissions not being under the Consideration or the View of the Parties. The yearly Revenue of the Hospital is about 800 *L. Sterling*; had the Magistrates thought of *Pitcairne's* being already upwards of 400 *L.* in arrear, and knowing that he was immediately to receive 800 *L.* more, it cannot be believed, that they would allow of a Restriction in the cautionary Engagement, even to a smaller Sum than was due at the Time. But their Intention certainly was to take Security for the Sum which might probably be in the Treasurer's Hands, at the Time stipulated for the Clearance of Accounts, either supposing that he had none of

of the Hospital's Money in his Hands, when the Transaction happened, or that it would be all expended on the necessary Uses before the Time of Clearance, which would infallibly have been the Case, had not the Bankruptcy so suddenly ensued. The Obligation was therefore restricted to 400 *l.* or Half a Year's Revenue, according to the constant Custom, founded upon the Supposition, that a Treasurer will never have more in his Hand at one Time.

But in whatever Manner the inaccurate and contradictory Clauses shall be reconciled, the Question still remains, whether, by the Conception of this Bond, and by the general Principles of Law applied to cautionary Engagements, this Bond can be understood to oblige the Petitioner to be accountable for *Pitcairne's* Intromissions, and to make good whatever Deficiencies he had incurred from the Period of his being first appointed Treasurer to this Hospital, whatever the Amount of these should be, or to the Extent of 400 *l.* when these Deficiencies had arisen before that the Petitioner had come under this cautionary Obligation. The Magistrates admit, it was in no Event to go beyond the 400 *l.* and the Petitioner humbly contends, it can in no Event respect Intromissions or Arrears of a prior Date.

The obligatory Words do all respect to future Time. It is a general Rule in the Interpretation of Contracts, Obligations, and even of Laws themselves, that they have no Retrospect, unless it is so declared in clear and express Words.

And the Specialty above taken notice of, *viz.* that *George Pitcairne* held this Office precariously, and was removeable at pleasure upon an Hour's Warning, had he remained never so solvent, ought, in the Petitioner's Apprehension, to put this Matter out of doubt, as the contrary Doctrine would be attended with the most unjust and absurd Consequences.

To illustrate this, let it be supposed, that, in the Space of one Week, or one Day, after granting this Bond of Cautionry, when *Pitcairne* had not intromitted with one Farthing

thing of the Hospital's Revenue, after the Petitioner's becoming bound, they had turned *Pitcairne* out of Office, and had thereupon made a Demand upon the Petitioner for the whole 400 *l.* as an Arrear previously incurred, it is submitted to your Lordships what for an Appearance this would have had.

And this is precisely the Case in hand; for though *Pitcairne's* Insolvency was a just Cause for removing him, *de plano*, within a few Weeks of the Petitioner's cautionary Engagement, when his Intromissions, in that Space, did not exceed 9 *l. Sterling*, how unjust must it appear, that the Petitioner should be made liable for a previous Arrear of 400 *l.* and which, for any thing known either to the Magistrates or the Petitioner, might have been triple that Sum.

Pitcairne's Insolvency would have been no just Cause for turning him out of Office, if your Petitioner was to be bound for his Intromissions at large.

Cautioners for Factors, Treasurers, and others of the like Nature, are understood to engage their Credit, in the View that having it in their Power to superintend and controul the Management of those for whom they bind, they can run no great Risk if it does not proceed from their own Fault or Neglect; but no Man, who is not a Fool, would bind for Bygones, the Extent unknown.

An Argument was raised from those Words in the Preamble of the Bond, where mention is made of *Pitcairne's* having been appointed Treasurer in *January 1762*, as denoting, that the Petitioner's cautionary Obligation was to have a Retrospect to that Time. The Magistrates will not alledge that any such thing was treated of, or that any Orders were given for having the Bond made out in that Form, it was merely an Operation of the Servant who wrote them out without Orders, and without Meaning, further than to describe his Appointment as Treasurer to the Hospital, the Date of which the Writer thought proper to insert; nor was

it possible the Petitioner, had he attended to it, could have suspected that such Use was to have been made of it.

The Petitioner shall conclude with the Words of the Roman Lawyer, l. 99. *de verb. obligat.* *Quicquid adstringendæ obligationis est, id nisi palam verbis exprimitur, omissum intelligendum est; ac fere secundum promissorem interpretatur: quia stipulatori liberum fuit verba late concipere.*

Agreeable to which Voet, *ad tit. de fidejuss.* § 12. lays down the Rule in these Words: *Et generaliter strictiorem fidejussum plerumque recipit interpretationem, ne extendatur ultra id quod expressum, aut saltem mente atque sententia verborum fidejussionis comprehensum est.*

May it therefore please your Lordships to alter your Inlocutor, and to suspend the Letters simpliciter, further than what respects Pitcairne's Intromissions after the Petitioner's Bond of Cautionry; or, before answer, to appoint the Magistrates specially to confess or deny, whether it was ever mentioned, proposed, or agreed, that the Petitioner should be bound for bygone Arrears.

According to Justice, &c.

ALEX. LOCKHART.

COPY

COPY Bond, Mr. *George Pitcairne*, Treasurer of the Trinity-hospital, and Cautioner, to the City of *Edinburgh*, 1765.

KNOW all Men by these Presents, me *George Pitcairne*, Merchant in *Edinburgh*. WHEREAS the Lord Provost, Magistrates and Council, with the Deacons of Crafts, Ordinary and Extraordinary, of the City of *Edinburgh*, Governors and Administrators of the Trinity-hospital there, by their Act of Council, dated the 6th Day of *January* 1762 Years, elected me into the Office of Treasurer to the said Hospital; AND WHEREAS, I the said *George Pitcairne*, did, upon the 29th Day of *February* last, propose to give a Bond to the Extent of 400 *l. Sterling*, by myself, and *Robert Gairdner*, Esq; late Commissary to the Army in *Scotland*, as Cautioner for me, in Manner after mentioned; whereupon the said Magistrates and Council, with the Deacons of Crafts, Ordinary and Extraordinary, did, upon the said 29th Day of *February* last, approve of the said Proposal, and did enact and ORDAIN, that in all Time hereafter, the Treasurer of the said Hospital, for the time being, shall, within three Weeks after his being elected into the said Office, find Caution to the Satisfaction of the Magistrates and Council of the said City, as Governors foresaid, for his Intromissions with the Revenue of the said Hospital: THEREFORE, I, as Principal, and with and for me, the said *Robert Gairdner*, Esq; as Cautioner, do hereby BIND and OBLIGE US, conjunctly and severally, our Heirs, Executors and Successors, and Intromitters with our Goods and Gear whatsoever, that I, the said *George Pitcairne*, shall make just Count, Reckoning and Payment, of the Rents and Revenue of the said Hospital, to the Magistrates.

In Cause, Robert Drummond Esq; late Com-

Magistrates and Council of the City of Edinburgh, as Govern-
ors of the said Hospital, so far as the same shall be intro-
mitted with by me, and to pay over the same to the particu-
lar Uses and Purposes, as is or shall be directed by the said
Governors; and that the Accounts of the said Hospital may
be regularly cleared, I shall lodge all the Vouchers of my
several Receipts and Payments, in the Hands of the Town's
Accountant, within three Months after the Term of Martin-
mas annually, during my Continuance in the said Office,
AND WE, jointly and severally, BIND and OBLIGE us,
and our forefairs, to make good all Deficiencies to the Ex-
tent of the said Sum of 400 l. Sterling, and that under the
Penalty of 80 l. Money foresaid, of liquidate Expences, in
case of Failzie, by and attour Performance. Clause of Re-
gistration, for Execution on six Days, dated 20th March
1764.

(Signed)

Geo. Drummond Esq;

Walter Hamilton
Dean of Guild
Patrick Lindsay
Treasurer
William Ramsay
Old Bailie
John Walker